IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 380 OF 1994

Employees State Insurance
Corporation
through Shri G. Rammurthy,
Deputy Regional Director
having his office at
"PANCHDEEP" Bhavan, Lower Parel,
Bombay - 400 013. ...Appellant.

V/s

1. Shri G.A. Malhotra, Partner,
M/s. Malhotra Automobiles,
Dr. E. Moses Road, Near Famous
Studio, Mahalaxmi Bridge, B'by-11

2. Shri P.A. Malhotra, Partner,
M/s. Malhotra Automobiles,
Dr. E. Moses Road, Near Famous
Studio, Mahalaxmi Bridge, B'by -11

3. Shri O. A. Malhotra, Partner,
M/s. Malhotra Automobiles,
Dr. E. Moses Road, Near Famous
Studio, Mahalaxmi Bridge, B'by-11

4. Mrs. K.A. Malhotra, Partner,
M/s. Malhotra Automobiles,
Dr. E. Moses Road, Near Famous
Studio, Mahalaxmi Bridge, By'by-11

5. M/s. Malhotra Automobiles,
Dr. E. Moses Road, Near Famous
Studio, Mahalaxmi Bridge, B'by-11

6. State of Maharashtra ...Respondents.

Mr. H.V. Mehta for the appellant.

Mr. A.S. Shitole, APP for the respondent No. 6 -
State.

CORAM: V.M.KANADE,J.
DATE: 22nd February, 2005

ORAL JUDGMENT:

1. Heard Mr. H.V. Mehta, the learned Counsel appearing for the appellant and the learned APP for the respondent No. 6 - State. None appears for respondent Nos.1 to 5 though served.

2. Appellant is the original complainant who had filed a criminal complaint under section 85(g) of the Employees State Insurance Act (For short "ESI Act") against the accused for non-production of record. The Trial Court, however, dismissed the complaint for default on account of non-appearance of the complainant by order dated 22/09/1993. Appellant is challenging the said order passed by the Trial Court.

3. Brief facts are that a complaint was filed by the Insurance Inspector against the accused for not complying with the provisions of section 85(g) of the ESI Act. The sanction to prosecute was granted by the Regional Director under section 86(1) of the ESI Act on 05/03/1986. Thereafter, a complaint was filed in 1987 and the complaint was dismissed for want of prosecution on 22/09/1993.

4. With the assistance of the learned Counsel for the appellant, I have gone through the roznama maintained by the Trial Court. From the roznama, it can be seen that the complainant remained absent consistently after 15/03/1991 till the order was passed on 22/09/1993. Thus, the record shows that from 15/03/1991 till 22/09/1993, the complainant had remained absent. It is true that under section 256(1) of the Criminal Procedure Code, the Magistrate can exercise his discretion and grant exemption to the complainant from appearing in Court after his evidence has been recorded and it is open for the Magistrate to record the evidence of other witnesses who are present in Court. Though, in my view, therefore, the Magistrate had erred in dismissing the complaint under section 256 of the Criminal Procedure Code, yet I do not see any reason to interfere with the said order, firstly, because the complaint is old one which was filed in 1986 and pertains to non-production of the records during the period of 1984-85. Secondly, it was open for the Public Prosecutor who was appearing on behalf of the complainant to have made appropriate application for completing the evidence on record and since no such steps were taken by him nearly for 11 months the matter was adjourned from time to time. It was the duty of the Public Prosecutor to have brought

to the notice of the Magistrate that other witnesses were present in the Court for the purpose of giving evidence and that the exemption should be granted to the complainant from appearing in Court. Since no such application was filed by the Public Prosecutor, possibly, the Magistrate had no other option but to exercise his discretion under section 256 of the Criminal Procedure Code in favour of the accused after application for dismissal of the complaint had been filed by them.

5. Under these circumstances and considering that more than 12 years have elapsed after the impugned order was passed by the Trial Court, I do not see any reason to interfere with the said order. Appeal is accordingly dismissed.

(V.M. KANADE, J.)